Public Bank Bhd v Seato Trading (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO C1488-85
ZAKARIA YATIM J
30 AUGUST 1995

Civil Procedure *— Execution — Delay — Application for leave to issue execution of judgment — Judgment obtained more than six years ago — Defendant still making repayments to plaintiff — Whether application should be dismissed on grounds of delay and laches —Whether court could exercise discretion to grant leave*

On 22 May 1986, the plaintiff obtained judgment against the defendants for a sum of RM757,808.40 with interest accruing thereon. Between 16 May 1990 and 29 March 1991, the third defendant had made a total number of six repayments. The amount still owing as at 15 May 1995 was RM1,841,929.74. The plaintiff then applied for leave for execution against the third defendant in respect of the arrears, even though more than six years had passed from the date of the judgment. Counsel for the plaintiff submitted that the court ought not to dismiss the plaintiff's application on the ground of delay and laches, as the plaintiff was only protecting its own interest in allowing time for the third defendant to make repayments.

Held, allowing the application:

(1) The court had a discretion to grant leave to issue execution even though six years had lapsed (see pp 167F–G); *Lamb (WT) & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402 followed.

(2) It was proper for the plaintiff not to issue execution when the third defendant was making payments. Negotiations for settlement by arrangement could be a reason given for the delay of an applicant to issue execution against the respondents (see p 167H–I); *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 22 and *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 followed.

[Bahasa Malaysia summary

Pada 22 Mei 1986, plaintif telah memperolehi penghakiman terhadap defendan-defendan untuk RM757,808.40, bersama-mana dengan faedah yang terakru ke atasnya. Antara 16 Mei 1990 dan 29 Mac 1991, defendan ketiga telah membuat sebanyak enam pembayaran balik. Jumlah yang masih terhutang pada 15 Mei 1995 ialah RM1,841,929.74. Plaintif kemudiannya telah memohon untuk kebenaran untuk pelaksanaan terhadap defendan ketiga berkenaan dengan tunggakan tersebut, walaupun lebih daripada enam tahun sudahpun berlalu sejak tarikh penghakiman. Peguam plaintif telah berhujah bahawa mahkamah tidak patut menolak permohonan plaintif

atas alasan kelambatan dan kelengahan, kerana plaintif hanya melindungi kepentingannya sendiri apabila ia memberi defendan ketiga masa untuk membuat pembayaran balik.

Diputuskan, membenarkan permohonan itu:

(1) Mahkamah mempunyai budi bicara untuk memberikan kebenaran untuk pelaksanaan walaupun enam tahun telahpun berlalu (lihat ms 167F–G) *Lamb (WT) & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402 diikut.

(2) Adalah wajar bahawa plaintif tidak mengeluarkan pelaksanaan apabila defendan ketiga sedang membuat bayaran. Perundinagn untuk penyelesaian secara pengaturan merupakan suatu sebab yang boleh diberi atas kelambatan seseorang pemohon untuk mengeluarkan pelaksanaan terhadap penentang (lihat ms 167H–I); *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 22 and *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 diikut.

Notes

For cases on execution, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue), paras 1248–1404.

Cases referred to

Lamb (WT) & Sons v Rider [1948] 2 KB 331; [1948] 2 All ER 402
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17
Tio Chee Hing v Chung Khiaw Bank Ltd [1981] 1 MLJ 22

Arthur Yap (Iza Ng Yeoh & Kit) for the plaintiff.
Sabriya Khan (Sri Ram & Co) for the third defendant.

Zakaria Yatim J: In this application, the plaintiff sought the order of the court in terms of the following prayers:

(i) the plaintiff be given leave to issue execution and/or commence bankruptcy proceedings against the third defendant abovenamed upon the judgment herein dated 22 May 1986, notwithstanding that six years have elapsed since the date of the judgment;

(ii) that the defendants do pay the costs of and occasioned by this application; and

(iii) all other directions and orders this honourable court deems fit.

At the commencement of the hearing, Miss Sabriya Khan, counsel for the third defendant, objected to the words 'and/or commence bankruptcy proceeding in the application'. After hearing the arguments of both counsel on the objection, I ruled that I would not consider those words in prayer (i). I then proceeded to hear the application for leave to issue execution.

In this case, the plaintiff obtained judgment for a sum of RM757,808.40 with interest accruing thereon at 15%pa with monthly

A rests from 1 March 1985 till the date of realization, and RM350 as costs. The third defendant made a total number of six repayments during the period between 16 May 1990 and 29 March 1991. The amount still owing as at 15 May 1995 was RM1,841,929.74.

Mr Arthur Yap, counsel for the plaintiff, submitted that although six B years had lapsed from the date of the judgment, no injustice or prejudice would be caused to the third defendant if leave to issue execution proceedings was granted. He added that in allowing time for the third defendant to make repayments, the plaintiff was only protecting its own interest by not putting any further pressure on the third defendant as it would jeopardize the settlement of the debt. He cited *Tio Chee Hing v* C *Chung Khiaw Bank Ltd* [1981] 1 MLJ 22. He further submitted that the court ought not to dismiss the plaintiff's application on the ground of delay and laches.

Miss Sabriya Khan submitted that the court should exercise its discretion judicially when considering whether or not to grant leave to D issue execution. She said that there must be sufficient grounds for the court to exercise its discretion. According to Miss Khan, the third defendant had made payments. The last payment was made on 29 March 1991. The plaintiff had foreclosed two pieces of properties. She contended that the plaintiff had not attempted to issue execution for more than one year. She said that judgment was obtained against the other two defendants. The E plaintiff would be given preferential treatment if leave was granted. The plaintiff should not be allowed to execute as of right. She cited *Lamb (WT) & Sons v Rider* [1948] 2 KB 331; [1948] 2 All ER 402 in support of her argument.

I have read *Lamb & Sons v Rider*. In that case the English Court of F Appeal said at p 399, 'In our judgment, however, the issue of execution is within the discretion of the court after six years have lapsed, even where no such change has occurred.'

Applying *Lamb & Sons v Rider* to the present case, I have the discretion to grant leave to issue execution even though six years had G lapsed. I think it was proper for the plaintiff not to issue execution when the third defendant was making payments. In *Tio Chee Hing v Chung Khiaw Bank Ltd*, the respondents had obtained leave to issue execution against the appellant on two judgments entered more than six years earlier. The reasons given for the delay were that there were negotiations for settlement by arrangement. The Federal Court held that the learned judge H had exercised his discretion properly.

In *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, the appellant obtained judgment in default of defence against the respondent for the sum of RM674,539.53 with interest. There was subsequent correspondence between the parties and it was agreed that the respondent I should pay RM850,000 in full settlement, out of which RM700,000 was to be paid forthwith and the balance by instalments. The sum of RM800,000 was paid, leaving the balance of RM50,000 outstanding. The respondent asked for time to pay. On 10 May 1978, the appellant rescinded the

agreement and demanded payment of the balance. As more than six years had elapsed from the judgment, the appellant applied for leave to levy execution. The application was dismissed in the High Court, and the appellant appealed. The Federal Court allowed the appeal holding that the learned judge did not exercise his discretion judicially.

Applying the above authorities to the present case, I think I exercised my discretion judicially when I made an order in terms of the application.

Application allowed.

Reported by Alexandra Wong